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USSC NO. 85-654

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

SEYMOUR ALLAN HURVITZ, MD, Petitioner

v.

DIVISION OF MEDICAL QUALITY, BOARD OF MEDICAL QUALITY ASSURANCE, DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER IN PRO SE

Supreme Court, U.S.
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CLERK

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TION OF RULE 28.5 INVALIDATES

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ffidavit of Service by Mail

ts Brief In Opposition, the

edical Quality-Board of Medical

ance (hereinafter "BMQA")

28.5 of this Court by failing

recite "that all parties

e served have been served",

INVALIDATES BMQA'S BRIEF IN

VIOLATION OF RULE 33.2(b)

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TIME ISSUE RAISED

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that Petitioner raised the
titutionality of California
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rt, WHICH IS FALSE. That
tutional issue was raised
fs before the
w Judge (hereinafter
QA and before the Superior

ii of its Brief in
nafter "Br. Opp.") states
rgued he was precluded from
e first time on appeal.
6.)"; this last quoted
E. There is no mention of
bout precluding Petitioner
constitutional issue for

the first time on appeal on pages A15-A16 of Petition for Certiorari.

IV. JURISDICTION

BMQA states [Br. Opp. 3] that this Court has jurisdiction to consider only one question presented, which is incorrect. This Court has jurisdiction to consider all of the six constitutional issues presented by Petitioner. The six constitutional questions were presented in Briefs and raised before the ALJ, BMQA, the Superior Court, the Appellate Court, and the California Supreme Court (in Petition for Review), but the Appellate Court failed to mention or rule on all of these issues in its decision. Furthermore, the courts of this land have ruled that Constitutional issues can be raised at any level of the appellate process.

Appellate Court Presiding Judge Feinerman clearly stated during Oral Argument that Superior Court Judge Savitch

was incompetent to read the xrays of 21 patients, comprising 390 angiographic xray films; in other words, Judge Feinerman expressed an oral opinion that Petitioner was denied judicial review since Superior Court Judge Savitch was incompetent to read the crucial angiographic xray evidence. If this Petition for Writ of Certiorari is granted, Petitioner will have a Transcript prepared for this Court of the Oral Argument before the Appellate Court.

V. ALLEGATION OF UNNECESSARY SURGERY

BMQA states [BR. Opp. 6] that the "executive director of the Board filed an accusation against petitioner, charging that, as to each of 22 individual patients, petitioner had performed one or more unnecessary surgical procedures", WHICH IS FALSE. Nowhere in the Accusation [Appellate Court Joint Appendix 1-39] does the Accusation make the above quoted statement about unnecessary surgery.

As stated on pages 20 and 21 of
ition for Certiorari, the Accusation
eged that in the treatment of 22
ients, Petitioner was guilty of gross
ligence in the following respects:
Failure to perform a complete history;
Failure to perform a complete physical
mination; 3. Failure to develop a
ferential diagnosis; 4. Failure to have
formed appropriate neurological
oratory studies before subjecting patient
the angiogram or to surgery; 5. Failure
perform a neurological evaluation before
jecting patient to the angiogram or to
gery.

As stated on page 21 of Petition for
tiorari, the Accusation further alleges
t in the treatment of 22 patients,
itioner was guilty of incompetence in the
lowing respects: 1. History and physical
not justify diagnosis of hindbrain
hemia and vertebral artery surgery;

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rtic arch angiogram does not indicate a
al obstruction of proximal vertebral
y as evaluated by Petitioner.

What the Accusation alleged against
ioner (as described above) is something
different than performing unnecessary
ry.

The ALJ, BMQA, Superior Court and
late Court found Petitioner guilty of
rming unnecessary surgery and declared
ncompetent and grossly negligent.

VI. LOCAL VS. NATIONAL STANDARDS OF MEDICAL CARE FOR GROSS NEGLIGENCE

BMQA discusses medical malpractice [Br. 19-20] regarding "standards of good al practice in the locality" and "the nized standard of the medical nity". However, as stated on pages 52 3 of Petition for Certiorari inafter "Petn. Cert."), there was a lation that the national ordinary ard of conduct applied. The national

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of conduct was presented in
y by Petitioner's expert witnesses,
olowski, Woods and Bonecutter. The
standard of conduct allegedly used
s non-expert witnesses at Saint
ospital, Santa Monica, CA, did not
Petitioner's case.
A's witnesses admitted in testimony
y were not experts in the diagnosis
tment of hindbrain ischemia and in
l artery surgery; BMQA failed to
expert medical testimony regarding
gligence [see Petn. Cert. 61-64].

VII. INCOMPETENCE

A acknowledges that the term
tence" has been defined by common
ces in California as an absence of
ation, ability or fitness to perform
ibed duty or function [Br. Opp. 24].
A's decision states that Petitioner
pert on vertebral-basilar artery
iency (hindbrain ischemia). BMQA's

decision sta
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CONTRADICTS
incompetent,
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s that "[Dr. Hurvitz's]
the commonness and importance
asilar artery insufficiency
ort in other expert opinions"
t. A88]. BMQA's decision
titioner is a "qualified
d Thoracic and Cardiac
Petn. Cert. A93].
n its decision does BMQA
oner incompetent to perform
ry surgery. In fact, in its
Petn. Cert. A93] BMQA
itioner to perform vertebral
ded he obtains a concurring
n for the first two years of
thin its decision BMQA
s finding that Petitioner is
y stating that Petitioner is
ertebral-basilar artery
and is a qualified
d Thoracic and Cardiac
y authorizing him to perform

vertebral arter

abovementioned

VIII. BMQA

BMQA'S act

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[Br. Opp. 33] i

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ACTION WAS ARBITRARY
UNREASONABLE

n was arbitrary and
QA's following statement
false: "There was no
asonable action by the
this case relied on
professionals to interpret
islature's intent
essional conduct'.
al.Ct. of Appeal, Petn., p.

on its former Executive
ert Rowland, who
d and signed the Accusation
r.
on Deputy Attorney General
") M. Gayle Askren, who
THE authority and expert
brain and on vertebral

artery surgery, but actually is totally misinformed on these subjects. Hindbrain ischemia (vertebral-basilar artery insufficiency) is described in the medical literature as a very common vascular disease of the brain, being in the stroke family of diseases [Exhibit LLL - p. 296; Ex. EEEE - 147; Ex. SSSS - p. 11]. On page 23 of BMQA's Closing Brief to Superior Court, DAG Askren came forth with the ludicrous, false statement to the effect that "major and minor strokes of the hindbrain do not exist"; DAG Askren's exact language in his Brief is as follows: "Dr. Hurvitz claims no less a distinction than to have found the true cause of some major, heretofore undiagnosed medical syndrome - vertebral-basilar artery insufficiency."

BMQA relied on witnesses who were not competent regarding hindbrain ischemia and vertebral artery surgery [Petn. Cert. 61-64], and who were involved in a conflict

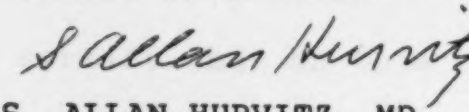
of interest concerning Petitioner's litigation with St. John's Hospital, Santa Monica, CA, since they were either employed by or on the Staff of St. John's Hospital [Petn. Cert. 14-17, 48-49].

BMQA relied on and adopted the decision of the ALJ, who was not sufficiently knowledgeable of hindbrain ischemia, vertebral artery surgery and vertebral artery angiographic xrays to intelligently decide the case. BMQA denied Petitioner's Petition for Reconsideration, again clearly denying him due process; BMQA consists of three doctors and three laymen - this group would have had a better understanding of the subject matter than the ALJ.

IX. CONCLUSION

For these reasons and the reasons given in the Petition for Certiorari, a writ of certiorari should be granted.

Respectfully submitted,



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PETITIONER IN PRO SE

December 23, 1985

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 1985, three copies of the Petitioner's Reply Brief to Respondent's Brief in Opposition were mailed, postage prepaid, to M. Gayle Askren, Esq., Deputy Attorney General, State of California, 110 West A Street, Suite 700, San Diego, CA 92101, Counsel for the Respondent (California Division of Medical Quality, Board of Medical Quality Assurance). I further certify that all parties required to be served have been served.

S Allan Hurvitz

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